

Respondent contends claimant has not established any of the factors from K.S.A. 44-506 necessary to make the Kansas Act applicable to this claim. The accident occurred in Missouri and there is no claim that his contract of employment was entered in Kansas. The issue then is whether claimant has established that his principal place of employment was in Kansas.

Respondent also contends claimant should not receive work disability because he returned to work at a comparable wage after the accident and was then terminated for cause. Respondent maintains it was prepared to accommodate restrictions if claimant had not been terminated for cause, and claimant could have continued to earn a comparable wage had he not been terminated for cause.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the evidence, the Appeals Board finds and concludes the Award should be modified to award benefits for a 30 percent general disability.

Findings of Fact

1. Claimant began working for respondent in 1989 as a service technician, repairing and servicing commercial food equipment such as mixers, dishwashers, scales, and electronic equipment used in meat marketing.
2. Claimant's job for respondent required that he travel from location to location in northeastern Kansas and northwestern Missouri to service equipment of various customers. His service area went from Odessa, Missouri, on the east, to De Soto, Kansas, on the west, and included the Kansas City metropolitan area.
3. Claimant had 24-hour per day use of a company vehicle. Claimant resided in Olathe, Kansas.
4. Claimant was dispatched by phone or radio from respondent's regional office in Lenexa, Kansas. Claimant submitted his mileage claims to the same Lenexa office.
5. On November 6, 1996, claimant experienced a sharp pain in his lower right back while he was leaning into a wrapping machine to replace a chain onto the sprockets. He fell to the floor and completely lost feeling in his right leg.
6. The November 6, 1996, accident occurred while claimant was working at a Hypermart in Kansas City, Missouri. This Hypermart was claimant's most-frequent customer.

7. After the accident, claimant was taken by ambulance to the emergency room of the Overland Park Regional Medical Center.

8. After the emergency room visit, claimant received treatment from his personal physician and from Dr. Robert R. Brown. Dr. Brown diagnosed a lumbar strain. An MRI study revealed no evidence of disc herniation, spinal stenosis, or gross foraminal narrowing. Dr. Brown continued to treat claimant through March 25, 1997, and then released claimant to his regular work without restrictions. In September 1997, Dr. Brown evaluated claimant's impairment. He rated the impairment as 5 to 6 percent. Dr. Brown had also treated claimant for a March 1995 back injury. He testified that of the 5 to 6 percent impairment, 4 percent was from the 1995 injury, leaving 1 to 2 percent attributable to the current injury.

9. Dr. Brown also reviewed a task list prepared by Mr. Michael J. Dreiling. The list included the tasks claimant had performed during the 15 years before the accident. Mr. Dreiling's report, including the task list, was introduced into evidence by stipulation of the parties. Dr. Brown testified claimant cannot now do two of the eight tasks because they involved lifting in excess of 100 pounds. Dr. Brown also testified he would not recommend claimant perform those tasks even if he had not had the injury on November 6, 1996.

10. Dr. P. Brent Koprivica examined claimant at the request of claimant's counsel on March 26, 1997. Dr. Koprivica diagnosed chronic pain from a chronic low back strain. Dr. Koprivica had also seen claimant for a back injury in 1995. Using the 3rd Edition, Revised, of the AMA Guides, he concluded claimant has an additional 3 percent impairment from the 1996 injury. Using the 4th Edition of the AMA Guides, he concluded claimant has an additional 5 percent impairment from the 1996 injury. He recommended restrictions as follows:

I would limit him to medium physical demand level of activities as defined by "The Dictionary of Occupational Titles". He should avoid sustained or awkward postures of the lumbar spine. Captive sitting should be limited to thirty-minute intervals with the allowance of taking a break.

11. Dr. Koprivica also reviewed the list of tasks prepared by Mr. Dreiling. He opined that claimant could not do three of the eight, or 37.5 percent, of the tasks. Dr. Koprivica converted this to a time-weighted task loss of 67 percent.

12. Claimant returned to light duty in January 1997, and Dr. Brown released claimant to return to his regular duties on March 25, 1997. But on March 24, 1997, respondent advised claimant he would have to either resign or be terminated. Claimant refused to resign and was terminated. The stated reason for termination was poor performance. By the time claimant was terminated, he was earning the same pay he was earning at the time of the injury. Claimant had volunteered to go into a job in the parts department and take a cut in pay approximately one month before his termination, but his offer was rejected.

13. On October 28, 1996, respondent had placed claimant on what respondent describes as a 90-day personal development program after complaints from two customers. Under this program, claimant's performance was to be reviewed every two weeks for three months. Claimant was advised that if his performance did not meet standards during the period, or at the end of the period, he was subject to additional discipline, including possible termination. The November 6, 1996, injury interrupted the program.

Stephen Proffitt, district manager, testified claimant was terminated for poor performance, not because of the injury. He also testified that he believed there were other customer complaints after claimant was put on the program. But his file contained documentation only of the customer complaints which occurred before claimant was put on the program. He thought there were other documents but they were not in his file. He also could not describe the nature of the complaints from other customers.

14. After he was terminated by respondent, claimant received unemployment compensation for three months and then obtained employment at Home Quarters earning \$10 per hour. The job at Home Quarters involved getting up on a prime mover and lifting doors. Claimant worked there approximately four months and left in November or December 1997 when he quit partly because of the difficulty he had doing the work lifting doors. Claimant's wife had died in August 1997. He ultimately decided to sell their house and begin a pawn shop business. The business had not started at the close of the evidence in this case.

Conclusions of Law

1. The Kansas Workers Compensation Act applies to injuries which occur outside the state of Kansas only if the employment contract was entered in Kansas or the principal place of employment was in Kansas. K.S.A. 44-506. In this case, the accident occurred in Missouri and claimant does not contend the employment contract was entered in Kansas.

2. The Board finds the principal place of employment was in Kansas. Under K.S.A. 44-506, the "principal place of employment" means the claimant's principal place of employment.¹ Claimant did a portion of his repair work at locations in Kansas, and he reported to, and was dispatched from, an office in Kansas. The Board considers these factors to establish claimant's principal place of employment to be in Kansas.

3. The Board also concludes claimant is entitled to work disability in this case. Although claimant was terminated for cause, there is nothing in the record to suggest he acted in bad faith after the injury. In fact, respondent's records contain reference to

¹ *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

claimant's conduct only before the injury. If he violated company policy after the injury or after he was placed in the development program, the evidence does not show what violations or what conduct justified further disciplinary action. In addition, claimant quickly obtained other employment after the injury, thereby suggesting he was making a good faith effort to obtain employment after his injury.²

4. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The Board finds claimant's task loss to be 31.25 percent. The Board has considered the opinions of both Dr. Brown and Dr. Koprivica. Dr. Brown states claimant should not do two of eight tasks (25 percent) but also testified claimant should not have done those two tasks before this injury. These were tasks involving lifting of over 100 pounds. The records shows that claimant had been doing those tasks and no physician had recommended that he not before this accident.

Dr. Koprivica concluded claimant cannot now do three of the eight tasks, or 37.5 percent. Dr. Koprivica, who had seen claimant for an earlier back injury, concluded he would not have restricted claimant before this accident in spite of the earlier injury.

6. The Board finds claimant has a 37 percent wage loss. This finding is based on a comparison of claimant's preinjury wage of \$633.67 and the \$400 per week claimant earned at Home Quarters after the accident. Claimant there made \$10 per hour and it appears he could have continued to do so even though he does testify to some difficulty in performing the duties. The Board concludes the wage in this job should continue to be imputed to claimant after he left Home Quarters.

7. The Board finds claimant has a 34 percent work disability based on a wage loss of 37 percent and a task loss of 31.25 percent. K.S.A. 44-510e.

8. Based on the testimony of Dr. Brown and the testimony of Dr. Koprivica, the Board finds claimant had a functional impairment of 4 percent before this injury which should be

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

deducted to arrive at a disability of 30 percent as the basis of benefits to be awarded. K.S.A. 1996 Supp. 44-501(c).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler on June 17, 1998, should be, and the same is hereby modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James R. Watson, and against the respondent, Hobart Corporation, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred November 6, 1996, and based upon an average weekly wage of \$633.67, for 8.57 weeks of temporary total disability compensation at the rate of \$338 per week, or \$2,896.66, followed by 124.5 weeks at the rate of \$338 per week or \$42,081, for a 30% permanent partial disability, making a total award of \$44,977.66.

As of February 26, 1999, there is due and owing claimant 8.57 weeks of temporary total disability compensation at the rate of \$338 per week, or \$2,896.66, followed by 111.72 weeks of permanent partial disability compensation at the rate of \$338 per week in the sum of \$37,761.36, for a total of \$40,658.02, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,319.64 is to be paid for 12.78 weeks at the rate of \$338 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Clark H. Davis, Olathe, KS

Gregory D. Worth, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director